(3)

Supreme Court, U.S.
FILED
JUN 27 2003
OFFICE OF THE CLERK

No. 02-1809

In The Supreme Court of the United States

J. ELLIOTT HIBBS, in his official capacity as Director of the Arizona Department of Revenue,

Petitioner,

v.

KATHLEEN M. WINN, Arizona taxpayer; DIANE WOLFTHAL, Arizona taxpayer; MAURICE WOLFTHAL, Arizona taxpayer; LYNN HOFFMAN, Arizona taxpayer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General

PAULA S. BICKETT
Chief Counsel, Civil Appeals

JOSEPH KANEFIELD*
Special Assistant Attorney General

1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8392

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

3 pp

Pursuant to Supreme Court Rule 15.8, Petitioner J. Elliott Hibbs respectfully submits this supplemental brief to bring to the Court's attention a new decision of the United States Court of Appeals for the Fifth Circuit, *American Civil Liberties Union Foundation v. Bridges*, No. 02-30493, 2003 WL 21362357 (5th Cir. June 11, 2003), which was issued after Petitioner filed the Petition for Certiorari on June 3, 2003. The Fifth Circuit's decision widens the split of authority among the circuits concerning the scope of the Tax Injunction Act, 28 U.S.C. § 1341. Indeed, the Fifth Circuit expressly acknowledged that its holding was consistent with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), and inconsistent with *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), the decision below. *Bridges*, 2003 WL 21362357, at *5.

In *Bridges*, the court held that the Tax Injunction Act prevented the federal district court from hearing a First Amendment challenge to certain Louisiana state tax exemptions. The Louisiana tax statutes exempted non-profit religious organizations from paying state and local sales and use tax on revenue generated from selling certain religious materials. *Bridges*, 2003 WL 21362357, at *1. The Fifth Circuit held that the challenge to the exemptions fell within the scope of the Tax Injunction Act because determining whether an individual or organization qualifies for an exemption is part of the "assessment" process. *Id.* at *5. The court found the ordinary definition of assessment is "the entire plan or scheme fixed upon for charging or taxing," and therefore necessarily included the determination of exemptions. *Id.* (quoting *Webster's Third New International Dictionary* 131 (1981)). The court disagreed with the Ninth Circuit's reasoning in *Winn v. Killian* and distinguished the cases cited and relied upon by the Ninth Circuit. *Id.* and n.2.

The Fifth Circuit also found that its precedent and the purpose of the Tax Injunction Act supported its holding. *Id.* at *6. The court noted that it has always interpreted the Tax Injunction Act broadly because such a construction is consistent with the purposes of the Act. *Id.* It also noted that the taxpayers were not left without recourse because the "state legislature has provided an adequate scheme whereby a taxpayer may maintain a suit to challenge a state tax" and then secure a review by this Court if necessary. *Id.* (quoting *Bland v. McHann*, 463 F.2d 21, 24 (5th Cir. 1972)).

The decision in *Bridges* highlights the need for this Court to review the Ninth Circuit's decision below. The decision is now in conflict with the Fifth Circuit as well as the First, Sixth, and Eleventh Circuits, and is at odds with the purpose for the Tax Injunction Act. The Court should grant certiorari to resolve the conflict among the circuits and provide uniformity and certainty in the lower courts' application of the Tax Injunction Act.

Respectfully submitted,

TERRY GODDARD
Attorney General of Arizona

MARY O'GRADY
Solicitor General

PAULA S. BICKETT
Chief Counsel, Civil Appeals

JOSEPH KANEFIELD*
Special Assistant Attorney General

1275 West Washington Street
Phoenix, Arizona 85007
(602) 542-8392

**Counsel of Record*